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Before The FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

Federal Communications Commission Office of Secretary

In the Matter of			99-263
SOUTHWESTERN BELL MOBILE SYSTEMS, INC.)		
Petition for Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in)	DA 97-2464	

COMMENTS OF BELL ATLANTIC MOBILE, INC.

BELL ATLANTIC MOBILE, INC.

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Dated: December 24, 1997

Whole-Minute Increments

SUMMARY

The commercial mobile radio services industry faces a wave of class action claims which, if left unchecked, will impair investments by CMRS carriers in improved service to customers, undermine Congress' goal of a consistent, federal structure for CMRS, and undercut the Commission's oversight responsibility for CMRS.

SBMS's Petition seeks a number of declaratory rulings which are fully consistent with Section 332 of the Communications Act and its mandate to the Commission — not to state courts — to ensure that carrier practices are just and reasonable. Many court decisions have dismissed class actions seeking damages based on carriers' pricing practices or alleged failures to disclose those practices. The rulings SBMS requests are in line with those court decisions. These rulings will restore the Commission to its proper role over wireless services, and permit achievement of Congress's model — enforcement of just and reasonable CMRS rates and practices by the federal Commission, through Sections 201 and 202 of the Act. BAM thus supports SBMS's Petition. The Commission must announce clear policies which courts can rely on to stop the attempts of class action firms to extract huge settlements from wireless carriers by claiming that the courts (not the FCC) should be deciding what rates and pricing practices carriers must follow.

First, the Commission should declare that class action damages claims which challenge a CMRS carrier's decision to charge for certain services, or how much to charge, are preempted. It must clearly state that all such damages

claims are barred, regardless of the underlying cause of action. Courts have rejected plaintiffs' attempts to avoid preemption by phrasing their claims in terms of fraud or failure to disclose, correctly noting that the remedy sought -- rebates or recalculation of rates -- cannot be distinguished from impermissible ratemaking.

The Commission should follow the reasoning of these courts.

Second, the Commission must declare that claims seeking court-ordered improvements in the coverage, quality or technical features of CMRS service are preempted. The Commission's long-standing exclusive jurisdiction to set consistent nationwide service quality and technical standards for wireless services is being challenged by these class actions, and it must intervene to stop them.

Third, the Commission should declare that the rounding up and send-to-end pricing practices of SBMS and other CMRS carriers are just and reasonable, and that any class action claims challenging these practices, or seeking damages based on them, are preempted.

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COMMENTS OF BELL ATLANTIC MOBILE, INC.

Bell Atlantic Mobile, Inc. (BAM), hereby submits its comments in support of the November 12, 1997 Petition for Declaratory Ruling (Petition) of Southwestern Bell Mobile Systems (SBMS).¹

I. WIRELESS CARRIERS FACE A CLASS ACTION LITIGATION CRISIS.

A. The Wide Scope of the Problem Requires
A Comprehensive Response by the Commission.

SBMS's Petition responds to the numerous class action lawsuits throughout the country which have been brought against cellular carriers, seeking court-ordered rebates of charges, court-ordered improvements in the quality of wireless service, and other remedies that are preempted by federal law. A partial listing of

¹The Commission asked for comments on SBMS's Petition in a <u>Public Notice</u> released November 24, 1997 (DA 97-2464).

the extraordinary number of actions filed nationwide against cellular carriers is provided with these Comments (Attachment 1). While the current wave of suits is directed at cellular carriers, it is inevitable that this wave will sweep over PCS providers as well, because most of the claims being made can be made against any wireless provider. The crisis is thus both substantial and growing.

Plaintiffs' class action firms have targeted cellular carriers for two reasons.

First, one of their principal prior sources of revenue has been taken away. Before 1995, many plaintiffs' class action firms focused on the securities industry. That year, however, Congress enacted the Private Securities Litigation Reform Act,

Pub. L. No. 104-67, which severely restricted the filing and prosecution of securities class action lawsuits. Second, the wireless telecommunications industry became an attractive target for these firms because of the industry's rapid growth and transformation into a widely used communications service. Unlike landline telephone carriers, which courts have generally held are shielded from liability by their filed tariffs, wireless carriers are no longer permitted to file federal tariffs, and are not subject to entry or rate regulation at the state level. Wireless

²E.g., Wegoland, Ltd. v. NYNEX Corp., 27 F.3d 17 (2d Cir. 1994); Porr v. NYNEX Corp., 660 N.Y.S.2d 440 (2d Dep't 1997); see also note 20, infra.

³"Commercial mobile radio service providers shall not file tariffs for interstate service to their customers, or for interstate access service." 47 C.F.R. § 20.15(c).

⁴"[N]o State or local government shall have any authority to regulate the entry of or the rate charged by any commercial mobile service or any private mobile service." 47 U.S.C. § 332(c)(3)(A). While that provision allows a state to petition the Commission for authority to maintain or impose rate regulation, and seven states filed petitions to maintain their rate regimes for cellular carriers, all seven petitions were denied. See, e.g., Petition of New York State Public Service Com-

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among courts as to the Commission's position. The Commission should issue a comprehensive response which addresses the types of claims that are repeatedly being asserted in these class actions, provides useful guidance to courts across the nation, and fulfills the Commission's statutory mandate to set consistent federal wireless communications policy.

mission To Extend Rate Regulation, Report and Order, 10 FCC Rcd 8187 (1995).

⁵"All charges, practices, classifications, and regulations for and in connection with [a common carrier's] communication services, shall be just and reasonable." 47 U.S.C. § 201(b).

⁶See, e.g., 47 U.S.C. §§ 208 (establishing process for prosecuting complaints at the Commission), 501-505 (granting penal and forfeiture provisions to the agency).

B. The Class Actions Against BAM.

SBMS describes the class action brought against it in federal district court in Boston, which seeks alleged damages and other relief based on SBMS's rates, including "rounding up" the duration of calls to the next full minute and determining the length of the call by the "last hang-up." BAM faces complaints which raise all of these same issues as well as other claims, in multiple jurisdictions. A case pending in the New Jersey Superior Court in Camden, New Jersey, is typical of these class actions (indeed many of the allegations made in different cases are worded in near-identical language). Plaintiffs have demanded that the court order BAM to make unspecified "improvements" in the quality of its service nationwide, and also that the court award millions of dollars to millions of class members through rebates of alleged "artificially inflated" rates charged over the past six years by BAM.

⁷E.g., Capital Holdings, Inc. v. New York Cellular Geographic Service Area, Inc., Index No. 2476/93 (Supreme Court, Rockland County, New York); Mandell v. Bell Atlantic NYNEX Mobile, Inc., No. 97-CVS-6528 (Superior Court, Mecklenburg County, North Carolina), Roman v. Bell Atlantic NYNEX Mobile, Inc., Index No. 96/604150 (Supreme Court, New York County, New York); Tolchin v. Bell Atlantic NYNEX Mobile, Inc., Index 17136/97 (Supreme Court, Kings County, New York).

⁸In re Cellco Consumer Litigation, Superior Court of New Jersey, Law Division, Master File No. L-95535-96. BAM is the managing general partner for Cellco, which holds licenses from the Commission to provide cellular service in New Jersey and in numerous other states and the District of Columbia. Plaintiffs Larry Carroll and Christopher Kuhn, residents of Pennsylvania, and Roslyn Tyman, a resident of New Jersey, brought separate actions against Cellco, which were consolidated for trial in the Superior Court, with the Carroll complaint serving as the operative pleading. A copy of the Carroll complaint is provided with these Comments (Attachment 2).

The New Jersey complaint is a wide-ranging attack on "the technological and performance characteristics" of BAM's service. Complaint, ¶¶ 38, 14. Plaintiffs ascribe the claimed deficiencies in system performance to "aggressive marketing efforts" in excess of the "technological capability" of BAM's existing systems. Id., ¶ 18. These service deficiencies have reportedly led to increased charges to subscribers. Plaintiffs assert that BAM had inflated its service prices through a series of misrepresentations including (like SBMS) the practice of rounding up partial minutes of airtime to the next full minute, and measuring the duration of a call until the last hang-up. ¶ 15. Additionally, plaintiffs complain of the carrier's failure to disclose that landline termination charges would be added to connections with land-based calls in addition to the charges for airtime. Id., ¶ 22. Plaintiffs plead violations of the New Jersey consumer protection laws, common law fraud, and negligent misrepresentation. They seek "improvements" in BAM's service quality, refunds of charges paid to "compensate" plaintiffs for their "actual damages," treble damages, punitive damages and attorneys' fees.

On November 14, 1997, the New Jersey court certified the case as a class action, subjecting BAM to years of litigation costs, potentially millions of dollars in forced rebates, and court-ordered cellular system quality improvements. The class which was certified includes a majority of all the customers that BAM and its predecessors have or have ever had.⁹ Class certifications of the size ordered by

⁹Although plaintiffs' claims are premised on allegations of reliance, evidence submitted to the court showed that different class members would have relied (if they relied at all) on many different types of service contracts, would have had

this court render all cellular carriers hostage to the vagaries of the litigation process, whatever the merits of the underlying claims that may be brought against them. The sheer size of such classes creates insurmountable pressure on carriers to settle because the costs and risks of defending against the class are too high.¹⁰

C. Class Action Lawyers, Not Customers With Service or Price Concerns, Have Created the Class Action Crisis.

It is critical that the Commission understand that the class action suits which led to the SBMS Petition are not motivated by the dissatisfaction of individual customers who believe that they have been overcharged or provided lower quality service. Instead, like many class actions, they are merely a vehicle for seeking lucrative settlements that benefit plaintiffs' lawyers. For example, a lead plaintiff in the New Jersey case against BAM is the sister of one of the attorneys bringing the suit!

Customers who have concerns about their wireless service have many remedies to address those problems, and they use them. BAM has invested

access to many different user guides and price plan information, and would have had different conversations with sales personnel. This lack of commonality should have precluded class certification. See, e.g., Fed R. Civ. Proc. 23(b)(3), Advisory Committee Notes to 1993 Amendments ("material variation in the representations made or the kinds or degrees of reliance" make class actions unsuitable).

¹⁰The Third Circuit recently held that a class of one million members -- much smaller than the class created by the New Jersey court against BAM -- was "surely too large . . . the difficulties likely to be encountered in the management . . . are insurmountable. . . . We cannot conceive of how any class of this magnitude could be certified." Georgine v. Amchem Products, Inc., 83 F.3d 610, 633-34 (3d Cir. 1996), aff'd sub nom. Amchem Products v. Windsor, 117 S.Ct. 2231 (1997).

enormous network and human resources in order to respond effectively to customer complaints and issues concerning billing, pricing of services, signal coverage, fraud, and other matters. BAM's customer service operation employs more than 2,100 people, and BAM has invested significant resources in billing and other equipment to be able to help customers and to respond to problems immediately. BAM's network technicians also regularly deal with customer complaints, including visits to customers' residences or offices to resolve problems.

While in BAM's experience virtually all customer concerns are resolved through this remedy, customers are also able to seek relief from the FCC and from state utilities commissions. During 1997, BAM received notices of 65 customer complaints which had been filed with the FCC, out of a continually growing customer base of more than five million subscribers. Both the Commission and state agencies have prompt notice and response deadlines, which ensure that a customer who seeks relief in these forums will receive expedited action. And in fact, all of the customer complaints filed with the FCC were resolved promptly.

In addition to BAM's consumer response resources, and the resources available at the federal and state level to address their complaints, consumers also have an entirely new additional remedy, an industry arbitration system. BAM was a leader in the industry-wide effort to establish this system to hear disputes among customers and carriers. The new "Wireless Industry Arbitration Rules" were established in 1996, are administered in conjunction with the American Arbitration Association, and provide customers with a convenient, faster, and less

expensive forum in which to resolve billing and service problems than litigation.

The costs of developing and implementing the arbitration system were paid for by wireless carriers. BAM's standard customer service contracts expressly call customers' attention to this remedy.

It is also important to note that this proceeding does not seek to restrain the authority of state utilities commissions. Instead, it asks that the Commission intervene in the class action crisis, by asserting its mandate to set federal wireless policy by precluding certain class action claims. SBMS's Petition asks only for a declaratory ruling that certain pricing practices are reasonable, and that certain claims raised in private class action litigation are preempted by federal law. SBMS does not ask the Commission to restrict the authority of state utilities commissions responsible for overseeing telecommunications carriers. State commissions remain authorized to adopt rules and policies for wireless carriers, where they have authority to do so under state enabling statutes, and where those rules and policies do not implicate entry or rates (for example, setting termination notice procedures). What state commissions (and courts) may not do is to order a wireless carrier to rebate revenues, or recalculate its rates for the benefit of a particular class of customers (and thereby discriminate against other customers). As SBMS establishes, damages awards or other remedies cannot be separated from unlawful intrusion into a carrier's decisions as to what services to charge for and how much to charge.

II. THE COMMISSION MUST ACT BECAUSE CLASS ACTIONS HURT THE PUBLIC AND UNDERMINE FEDERAL OVERSIGHT OF THE WIRELESS INDUSTRY.

The facts about the cellular class actions, laid out above and in SBMS's Petition, are necessary to understand the scope of the crisis. Why, however, should the Commission intervene? SBMS's Petition correctly answers that question by demonstrating that these suits are in flat-out conflict with the overarching federal regime for wireless regulation, and with years of court and Commission precedent. There is an additional reason which should compel the Commission to act, which relates to the significant harm this litigation has on carriers and consumers.

A. Class Actions Divert Carriers From Serving Customers.

In reviewing the legal issues raised in this proceeding, the Commission must keep in mind the enormous adverse practical impact of class actions on the service of SBMS, BAM and other carriers. The harm that unchecked class actions has on the industries they attack -- as well as the customers of those industries -- has been widely noted by various legal scholars. One study of all class actions in the Northern District of California from 1985 to 1993 concluded:

This study reveals extensive domination by class counsel and judicial laxity in overviewing crucial decisions of adequacy of representation, notice, certification and settlement. . . . Representation by named parties provides little or no check on the increasing domination by class attorneys. Class counsel, unrestrained by the codes of professional responsibility or monitoring by representatives, have a greatly

enhanced role in these lawsuits, which they initiate, finance, and for the most part control.

The case for reform is clear. The substantial unfairness of class action processes documented above have undercut public confidence and trust.¹¹

Much of the widespread criticism of class actions is based on evidence that they do not benefit the very consumers on whose behalf they are purportedly brought. Congress' determination to restrict securities class action litigation in 1995 flowed in part from the concern that class actions were not helping securities customers. The Senate Committee voting out the bill which became the Private Securities Litigation Reform Act found:

Although private securities class actions can complement SEC enforcement actions, the evils flowing from abusive securities litigation start with the filing of the complaint and continue through to the final disposition of the action. . . . These lawsuits have added significantly to the cost of raising capital and represent a "litigation tax" on business. Smaller start-up companies bear the brunt of abusive securities fraud lawsuits. . . . The Securities Subcommittee heard extensive testimony concerning certain areas of abuse involving class actions. 12

These concerns are equally valid for the wireless industry. First, these cases create an enormous drain of resources on carriers which are forced to defend them at huge cost. In its auction rules and many other policies, the Commission has repeatedly recognized the importance of promoting new, start-up firms to

¹¹Downs, "Federal Class Actions: Diminished Protection for the Class and the Case for Reform," 73 Neb. L. Rev. 646 (1994)

¹²S. Rep. No. 104-98, 104th Cong., 2d Sess. (1995), reprinted in 1995 <u>U.S.Code</u> Cong. & Admin. News 679, 687-89.

enter the wireless markets, yet, as Congress has found, small companies "bear the brunt" of class actions. The human and financial resources that go into defending these actions must come from one of two sources. Carriers must take resources that would otherwise go to investments in new infrastructure and services -- cell sites, better coverage, digital technology, state-of-the-art features. Resources for improving these services are already thin because of the many new obligations the Commission has imposed on wireless carriers to provide, for example, wireless number portability and enhanced 911. Alternatively, carriers must recoup the costs of class action litigation through higher rates. Either way, customers as well as carriers lose.

B. Class Actions Ignore The FCC's Mandate to Regulate Wireless Services in the Public Interest.

Congress and the Commission have repeatedly declared that the wireless industry is a national telecommunications resource, that there is a commensurate compelling federal interest in setting consistent national wireless policy, and that consistent regulation will promote bringing the benefits of wireless communications to the public. See SBMS Petition at 4-6. The burgeoning class action crisis, however, threatens to render Commission oversight and authority a nullity. Court judges, not the FCC, are being asked to decide whether carrier rounding up and billing practices are reasonable and lawful. Judges, not the FCC, are being asked to decide what rates would have been "reasonable." Judges, not the FCC, are being asked to decide how much revenues from customers must be rebated when

practices are found to have been unreasonable. And judges, not the FCC, are being asked to decide what level of service "quality" wireless carriers must invest in and maintain.

The Commission should emphasize that its forbearance in 1994 from enforcing the tariffing provisions of the Act¹³ was expressly intended to enhance competition in the industry by freeing carriers from excessive regulation of their practices, and was based upon a finding that the market was capable of protecting consumers from unjust and discriminatory practices and discriminatory rates. It was not meant as an invitation to allow state courts to re-regulate the industry through the medium of class action litigation. The Commission has stated that the purpose of detariffing was to facilitate the growth of the CMRS industry and to ensure a stable environment for investment. Class action litigation subjects the carriers to the possibility of unpredictable, potentially ruinous awards and runs counter to the national policy favoring rapid development of the CMRS industry.

Reregulation is occurring without recourse to the FCC, even though it has both the mandate and the expertise to address these matters. Class actions are nothing less than an attack on the FCC's mandate to oversee the industry, and on Sections 201 and 202 of the Act as the mechanisms to ensure that carrier practices are just and reasonable. This is an attack that the FCC cannot let continue without abandoning its mandate to set consistent, national wireless policy.

¹³Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994).

III. THE FCC SHOULD PREEMPT CLASS ACTION DAMAGES CLAIMS THAT IMPLICATE A CMRS CARRIER'S RATES.

SBMS asks the Commission to declare that any award of <u>damages</u> for state law claims based on a wireless carrier's rounding up or charging for incoming calls is preempted by Section 332(c)(3) of the Act, because it would constitute impermissible rate regulation. Petition at 16-23. SBMS reviews the extensive caselaw which holds that awarding damages constitutes rate regulation, since it would effectively reset the carrier's prices and alter its choices as to what services to charge for and how much to charge. SBMS demonstrates why that caselaw is directly applicable here. Because courts cannot set the rates of wireless carriers, they cannot award such damages. BAM supports SBMS' request.

It is important that the Commission explicitly include all damages awards that implicate rates in its ruling, regardless of the way that the cause of action was phrased. Many of the current class actions seek to avoid efforts to dismiss them under Section 332 by claiming that the issues do not implicate the "rates charged" but are grounded instead in an allegedly fraudulent "concealment" or "misrepresentation" of those practices. But the caselaw exposes and rejects these attempts, because courts have recognized that they are merely ways to escape the bar on judicial interference in carrier rates.

The Commission should declare that retroactive recalculation of charges to subscribers, whatever the factual basis for the claim, is tantamount to rate-setting and preempted by § 332(c)(3) of the Act. The reason for this should be apparent

once the Commission stops to evaluate how damages would be calculated. The only way a court can impose a damage award involving rebates or "disgorgement" of revenues, as the wireless class actions demand, is to determine what would be a "reasonable" rate absent the alleged "fraudulent concealment," and on that basis determine the extent of the damages by awarding the difference between the "inflated" rate and the "proper" rate. See SBMS Petition at 20-21.

This is precisely what the New Jersey class action against BAM seeks -retroactive damages to "compensate" plaintiffs for the "overinflated" prices they
paid. The same demand is made in other class actions against BAM and other
wireless carriers. Plaintiffs in the New Jersey case argue that the prices which
class members paid were inflated because BAM rounded up to the nearest full
minute and charged for the duration of the call until the last party hung up. The
remedy plaintiffs demand would require the court to determine what would have
been a "reasonable" rate for partial minutes of telephone use as opposed to
rounded minutes. The court would have to decide what rate was lawful for the
time period after a call is dialed but before conversation begins, and the period
after the conversation ends but before the call is disconnected. Essentially, the
court would have to adjust retroactively BAM's rates, in order to calculate what
BAM should have charged.

It makes no legally cognizable difference how the basis for relief is articulated, because courts have focused on the evil in the <u>damages remedy</u> itself. They have found that awarding damages cannot be separated from retroactive

disclosure, breach of contract, or any other cause of action. And they have found that such retroactive rate-making is precisely the kind of rate regulation that courts cannot engage in. Other courts have exposed these claims for "fraudulent concealment" as in reality demanding impermissible ratemaking, and have rejected them. For example, the New York State Appellate Division has declared:

[W]ere lawsuits like this one (alleging concealment of the "rounding-up" of partial minutes of airtime) to be countenanced, consumers would be further penalized because utilities would be forced to raise their rates to cover the cost of potentially endless litigation brought by 'eager lawyers, using the class action vehicle [to] circumvent the state['s] rate-making mechanisms'.¹⁴

The Second Circuit agreed, specifically rejecting damages claims based on allegations that a telecommunications carrier had fraudulently overcharged its customers:

The plaintiffs respond that courts would not be required to determine a "reasonable" rate, but rather would only have to decide what damages arose from the fraud, a task courts routinely undertake. However, the two are hopelessly intertwined: "The fact that the remedy sought can be characterized as damages for fraud does not negate the fact that the court would be determining the reasonableness of rates," and that "any attempt to determine what part of the rate previously deemed reasonable was a result of the fraudulent acts would require determining what rate would have been deemed reasonable absent the fraudulent acts, and then finding the difference between the two." 15

¹⁴Porr v. NYNEX Corp., 660 N.Y.S.2d 440, 447 (2d Dep't 1997).

¹⁵Wegoland, Ltd. v. NYNEX Corp., 27 F.3d 17 (2d Cir. 1994), citing Wegoland, Ltd. v. NYNEX Corp., 806 F. Supp. 1112, 1119-21 (S.D.N.Y.1992).

Last year another federal court dismissed class action damages claims brought against Comcast, a cellular provider, finding that they were preempted by Section 332(c)(3). Again, plaintiffs sought to word their claims as based on state common law, and asserted "fraud" and "misrepresentation" by Comeast as to its billing practices. Again, the district court rejected the claims, branding them as mere "artful pleading," and held that the "true gravaman of plaintiffs' claim was a challenge to Comcast's rates and billing practices." It noted that the "broad preemptive force of the Communications Act" entitled plaintiffs to pursue their claims under that Act, but not by asserting fraud and misrepresentation. And it found that the Act's important goal of avoiding "a myriad of conflicting regulations" of carriers' rates and billing practices would be undermined, were class action plaintiffs permitted to seek damages for alleged fraud involving those rates and practices:

The facts of this case provide a compelling demonstration of the necessity of a federal forum in order to ensure uniform regulation. Comcast does business not only in Pennsylvania but also in Delaware, Maryland and New Jersey. Virtually identical allegations to the ones contained in the complaint presently pending before this court were filed in state courts in Pennsylvania, Delaware and New Jersey creating the potential for three radically different determinations of Comcast's obligations to its customers regarding its rates and billing practices. Thus, this court's determination that Plaintiffs' claims arise under federal law is entirely consistent with the stated policies and goals of the Communications Act. 18

¹⁶In Re Comcast Cellular Telecommunications Litigation, 949 F. Supp. 1193 (E.D. Pa. 1996).

¹⁷<u>Id</u>., 949 F. Supp. at 1202-03.

¹⁸<u>Id.</u>, 949 F. Supp. at 1204.

Many other courts have dismissed damages claims because those claims cannot be distinguished from ratemaking. In those cases, carriers' filed tariffs prevented courts from intervening. Section 332(c)(3) is an equally complete bar to judicial intervention in rates. Indeed, given Congress' explicit determination that state rate regulation be preempted, it would be a perverse result of Congress' action to now grant states and state courts new powers to regulate a wireless carriers' rates by awarding rebates or refunds in the form of damages, powers that they did not possess before. Even more perversely, wireless carriers, despite being freed by Congressional statute from rate regulation, would be subject to more court regulation than landline carriers, even though landline carriers still remain subject to rate regulation.

Awarding damages involving rebates or refunds must be preempted for an independent reason -- it would result in unlawful price discrimination among customers in violation of Section 202 of the Act, because not all of BAM's customers will be able to recover damages for any alleged non-disclosure. For example, customers whose contracts contain an exclusive arbitration remedy for resolving disputes would not be included in the class. In the New Jersey case against BAM seeking damages for rounding up, plaintiffs have excluded certain customers by the ways in which they defined the class (see Complaint ¶ 5). In

 ¹⁹See H.J. Inc. v. Northwestern Bell Tele. Co., 954 F.2d 485, 493-94 (8th Cir. 1992); Marcus v. AT&T Corp., 938 F. Supp. 1158, 1171 (S.D.N.Y. 1996); Hardy v. Claircomm Communication Group, 937 P.2d 1128, 1132 (Wash. Ct. App. 1997); Talton Telecomm. Corp. v. Coleman, 665 So. 2d 914, 916 (Ala. 1995).

addition, not all of BAM's customers (including plaintiffs themselves according to their testimony in that case) necessarily read or relied on the advertising, marketing and promotional materials which plaintiffs claim were fraudulent. Only those customers who read such materials, who misinterpreted them as advertising second-by-second incremental billing, who somehow can escape actual or constructive knowledge of the common industry practice of rounding telephone usage charges, and who would have acted differently, would be eligible for a refund if plaintiffs are successful.

IV. THE FCC MUST PREEMPT CLAIMS THAT SEEK TO IMPOSE QUALITY STANDARDS ON WIRELESS SERVICE.

The New Jersey class action against BAM attacks the service quality of BAM's cellular service nationwide. Plaintiffs seek to impose a particular grade of service on cellular service consumers and to require the state court to mandate widespread rebate of charges because of BAM's alleged failure to achieve some hypothetical quality standards within the alleged expectation of consumers.

Plaintiffs claim that BAM has "lured more customers than it can successfully handle" ¶ 18, and has received "substantially increased revenues resulting from the tremendous increase in the number of cellular telephone users", id., ¶ 13, but has "failed to expand the technological capability of [its] existing systems", id., ¶ 18, in order to maintain "the level of service to which callers are accustomed". Id., ¶ 13. Plaintiffs ask for a court order mandating unspecified "improvements" in cellular service -- improvements that would be required

throughout BAM's entire large coverage area. BAM has already invested millions of dollars to expand and improve the capacity and quality of its cellular network, provide coverage to new areas, and offer CDMA digital technology. Uncertainty as to possible future court-ordered "improvements" in service can only hinder further investment, undermining the Commission's goal to encourage carriers to invest in wireless infrastructure.

The Commission should clearly preempt this type of claim because its plenary jurisdiction over determining the quality of wireless service is well-settled. Since it created the cellular service in 1981, the Commission has never wavered from occupying the field. The law is thus clear that neither states nor courts may impose their own particular quality standards for cellular service.²⁰

In its Report and Order in Cellular Communications Systems, 86 FCC 2d 469 (1981), the Commission addressed the issue of technical standards for cellular carriers, and asserted federal primacy over state-imposed requirements, finding that consistent technical standards were essential to allow cellular service to develop quickly on a national basis. It also decided to limit the number and scope

²⁰Federal primacy where necessary to preserve a federal scheme for the provision of interstate communications has previously been upheld, even when not based upon the FCC's exclusive radio licensing authority. See <u>Telerent Leasing Corp.</u>, 45 FCC.2d 204 (1971), aff'd sub nom. <u>North Carolina Utilities Commission v. FCC</u>, 537 F.2d 787 (4th Cir.), <u>cert. denied</u>, 429 US 1027 (1976); <u>North Carolina Utilities Commission v. FCC</u>, 552, 1036 (4th Cir. <u>cert. denied</u>, 434 US 874 (1977). See also <u>California v. FCC</u>, 567 F.2d 84 (DC Cir.), <u>cert. denied</u>, 434 US 1010 (1978). (FCC authorization of physically intrastate foreign exchange service overrode state restriction on use of facilities prohibiting such service.)

of technical requirements to allow competitive evolution of new technology, and found that any state-imposed requirements could frustrate these goals:

The technical standards set forth in this Report and Order are the minimum standards necessary to achieve the desired goals and any state licensing requirements adding to or conflicting with them could frustrate federal policy.

<u>Id</u>., ¶ 82.

The Commission identified three purposes to be served by technical standards: definition of cellular mobile radio, compatibility of operation, and "maintenance of signal quality and other quality aspects of system performance."

Id., ¶ 84. (emphasis supplied). It then set standards for cellular design, height and power limitations, equipment compatibility, and other matters. As for CMRS service quality, however, the Commission determined that the agency would not itself impose service quality standards upon the carriers -- nor would it allow the states to do so. It asserted its exclusive jurisdiction over service quality:

A quality "comparable to landline" has been demonstrated as possible over the course of this proceeding. It does not appear necessary or desirable, however, for us to take the next step and impose a particular grade of service on cellular service consumers regardless of their willingness to pay for it. Setting quality standards could also have the detrimental effect of denying service to economically marginal markets. We favor allowing the interplay of market forces to determine the grade of service delivered.

Id., ¶ 95 (emphasis added).

The Commission's long-standing policy of federal oversight of service quality by wireless carriers has not changed. Given Congress's mandate in the 1993

Omnibus Budget Act for consistent federal oversight of the industry generally, the

Commission's primacy over technical and service quality standards is even more essential today.

In the New Jersey class action against BAM, plaintiffs demand that the court order "improvements in [BAM's] delivery of cellular services." This, however, is a matter clearly within the exclusive jurisdiction of the Commission, and the Commission should so declare in this proceeding. It would be impossible for a court to grant such relief without transgressing the field occupied by the Commission. Were plaintiffs allowed to demand that courts decide what constitutes "acceptable" service or force carriers to modify their systems, the result would be a patchwork of state-by-state, or court-by-court, requirements. This would not only violate federal primacy over the wireless telecommunications industry; it would also frustrate carriers' ability to provide seamless service in response to competitive forces and consumer needs. Court-ordered service quality requirements would, in sum, completely undermine the important benefits to the public from exclusive, consistent federal regulation of wireless networks.

V. THE FCC SHOULD DECLARE THAT SBMS' ROUNDING UP AND OTHER PRICING PRACTICES ARE REASONABLE, AND THAT CLAIMS CHALLENGING THEM ARE PREEMPTED.

SBMS correctly argues that federal law prevents state courts from attempting to determine whether rounding up and other identified pricing decisions practices are reasonable, and that this is a responsibility for the Commission, both under the language of the Act and the overarching federal